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No. 98-1011

In the Supreme Court of the United States

OCTOBER TERM, 1998

DANIEL MAGANA-PIZANO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 and Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 deprived the court of appeals of jurisdiction over cross-petitioner's petition for review of his deportation order.

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As explained in detail in our petition for a writ of certiorari in *INS* v. *Magana-Pizano*, No. 98-836 (filed Nov. 18, 1998), cross-petitioner is an alien deportable by reason of having been convicted of a controlled substance offense. On May 17, 1996, the Immigration and Naturalization Service commenced deportation proceedings against him. Cross-petitioner conceded his deportability but applied for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). The Board of Immigration Appeals (BIA), however, concluded that he was ineligible under Section 1182(c) for such relief. The BIA followed the Attorney General's decision in *In re Soriano* (98-836 Pet. App. 99a-112a), that Section 440(d) of the Antiterrorism and Effective Death

Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, which amended Section 1182(c) to render aliens convicted of controlled substance offenses ineligible for relief, should be applied in all pending deportation proceedings. See 98-836 Pet. 8-10.

Cross-petitioner then filed a petition for review of his deportation order in the court of appeals, pursuant to 8 U.S.C. 1105a(a) (1994), and also filed a petition for a writ of habeas corpus in district court under the general federal habeas corpus statute, 28 U.S.C. 2241. He argued both that the Attorney General's decision in *Soriano* was wrong as a matter of statutory interpretation, and also that Section 1182(c) violated constitutional equal-protection principles insofar as it had been construed by the BIA to deny eligibility for discretionary relief to aliens placed in deportation proceedings in the United States, but not aliens seeking admission to the United States from abroad. The district court dismissed his habeas petition, and he appealed to the court of appeals, which consolidated that appeal with his direct petition for review. The court of appeals then concluded that (a) Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-626, deprived it of all jurisdiction over the petition for review; (b) 8 U.S.C. 1252(g) (Supp. II 1996), as amended by IIRIRA, deprived the district court of jurisdiction over the habeas corpus petition; but (c) that deprivation of judicial review violated the Suspension of Habeas Corpus Clause, U.S. Const. Art. I, § 9, Cl. 2; and so (d) as a remedy for that purported unconstitutional suspension of judicial review, the district court should be permitted to exercise jurisdiction over cross-petitioner's claims under the general habeas corpus statute, 28 U.S.C.

2241. The court of appeals accordingly remanded the case to the district court for further proceedings on the habeas corpus petition. See 98-836 Pet. 10-14.

The government has filed a petition for a writ of certiorari, asking this Court to review the court of appeals' determination that the district court could exercise habeas corpus jurisdiction under 28 U.S.C. 2241 to review cross-petitioner's challenges to his deportation order. In our petition for a writ of certiorari, we explain (at 16-22) that, although neither the district court nor the court of appeals has jurisdiction to review the merits of the Attorney General's decision in *Soriano*, the court of appeals does have jurisdiction to review cross-petitioner's constitutional challenge to a provision of the Immigration and Nationality Act itself, notwithstanding Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA. We argue further that, if (contrary to our submission) the Constitution requires that some court have jurisdiction over cross-petitioner's non-constitutional challenge to the Attorney General's denial of his request for discretionary relief from deportation, that court is the court of appeals, on direct petition for review, and not the district court, on a collateral habeas corpus petition. See 98-836 Pet. 18-21, 24-25.

The alien now has filed a conditional cross-petition for a writ of certiorari, seeking review of the court of appeals' dismissal of his petition for review for lack of jurisdiction; he urges the Court to grant his cross-petition if it grants our principal petition (although he urges the Court to deny our petition). We agree that the cross-petition should be granted if (as we urge) the Court grants our petition, and that the two cases should be consolidated for briefing and oral argument. If the Court agrees with our submission that Section 440(a) of

AEDPA and Section 309(c)(4)(G) of IIRIRA do not deprive the court of appeals of all jurisdiction over the constitutional claim in the petition for review (see 98-836 Pet. 16-20), and that Section 1252(g)'s restriction on the district court's jurisdiction therefore presents no constitutional difficulty, it would reverse the court of appeals' judgment insofar as it remanded the case to the district court for further proceedings on the habeas corpus petition. Absent a cross-petition, however, the Court might not have the authority also to reverse the court of appeals' dismissal of cross-petitioner's petition for review and to direct that that petition be heard on the merits of whatever claims are not barred by Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA. It appears that such a result would grant relief beyond that awarded by the court of appeals, which ordinarily can be ordered only if a cross-petition for a writ of certiorari is filed. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985). To ensure that the Court has the authority to address all the jurisdictional questions presented in the case, and also to grant complete relief, the cross-petition should be granted and consolidated with our petition for briefing and oral argument.

* * * * *

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be granted and

consolidated with the petition for a writ of certiorari in *INS* v. *Magana-Pizano*, No. 98-836, for briefing and oral argument.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1998